

## CCRB INVESTIGATIVE RECOMMENDATION

Investigator: Luke Petrinovic	Team: Squad #3	CCRB Case #: 201809463	<input type="checkbox"/> Force	<input checked="" type="checkbox"/> Discourt.	<input type="checkbox"/> U.S.
			<input checked="" type="checkbox"/> Abuse	<input type="checkbox"/> O.L.	<input type="checkbox"/> Injury
Incident Date(s) Monday, 11/12/2018 8:50 AM	Location of Incident: § 87(2)(b) East 143rd Street and Third Avenue; 40th Precinct stationhouse	Precinct: 40	18 Mo. SOL 5/12/2020	EO SOL 12/27/2020	
Date/Time CV Reported Mon, 11/12/2018 3:55 PM	CV Reported At: CCRB	How CV Reported: Call Processing System	Date/Time Received at CCRB Mon, 11/12/2018 3:55 PM		

Complainant/Victim	Type	Home Address
§ 87(2)(b)	§ 87(2)(b)	§ 87(2)(b)

Subject Officer(s)	Shield	TaxID	Command
1. POM Malik Mccloud	30082	954114	040 PCT
2. An officer			
3. POM Ernesto Bautista	28399	953671	040 PCT

Witness Officer(s)	Shield No	Tax No	Cmd Name
1. POF Jessica Sancho	06938	961237	040 PCT
2. POM Victor Lopez	15149	935207	040 PCT
3. POF Lisa Reyes	08946	957080	040 PCT

Officer(s)	Allegation	Investigator Recommendation
A.POM Malik Mccloud	Abuse: At § 87(2)(b) in the Bronx, PO Malik Mccloud stopped § 87(2)(b)	§ 87(2)(b)
B.POM Ernesto Bautista	Abuse: At § 87(2)(b) in the Bronx, PO Ernesto Bautista stopped § 87(2)(b)	§ 87(2)(b)
C.POM Ernesto Bautista	Discourtesy: At East 143rd Street and Third Avenue, in the Bronx, PO Ernesto Bautista spoke discourteously to § 87(2)(b)	§ 87(2)(b)
D.POM Ernesto Bautista	Abuse: At East 143rd Street and Third Avenue, in the Bronx, PO Ernesto Bautista threatened § 87(2)(b) with the use of force.	§ 87(2)(b)
E.POM Ernesto Bautista	Discourtesy: At East 143rd Street and Third Avenue, in the Bronx, PO Ernesto Bautista gestured discourteously toward § 87(2)(b)	§ 87(2)(b)
F. An officer	Abuse: At the 40th Precinct stationhouse, in the Bronx, an officer did not process § 87(2)(b)'s complaint regarding an officer.	§ 87(2)(b)

### Case Summary

On November 12, 2018, § 87(2)(b) filed this complaint via the CCRB Call Processing System.

On November 12, 2018, at approximately 8:35 a.m., § 87(2)(b) was leaving his doctor's office located at § 87(2)(b) in the Bronx. As he exited the building to walk to his car, he was approached by PO Ernesto Bautista and PO Malik McCloud, of the 40<sup>th</sup> Precinct. PO Victor Lopez and Jessica Sancho, also of the 40<sup>th</sup> Precinct, were also present. § 87(2)(b) asked if he could leave, and PO Bautista said, "No, you're being detained." (**Allegations A and B – Abuse of Authority:** § 87(2)(g)). PO Bautista asked § 87(2)(b) about an altercation that had allegedly happened inside the doctor's office he had just left. § 87(2)(b) asked again if he could leave, and PO Bautista again said no, but, regardless, § 87(2)(b) got into his vehicle, which was parked nearby, and left the area.

§ 87(2)(b) drove his car, a Lexus Sedan with tinted windows, down Third Avenue, and several minutes later he was pulled over at East 143<sup>rd</sup> Street by PO Bautista and PO McCloud. PO Lopez and PO Sancho, were present for this car stop as well. PO Bautista proceeded to issue § 87(2)(b) two summonses for excessive window tints. During the car stop, PO Bautista allegedly said, "Open your fucking window," several times, and said to § 87(2)(b) "Fucking ass pussy playing games," (**Allegation C – Discourtesy:** § 87(2)(g)). PO Bautista also allegedly said to § 87(2)(b) "I'll kick your ass," repeatedly (**Allegation D – Abuse of Authority:** § 87(2)(g)). PO Bautista issued § 87(2)(b) summonses for tinted windows, and then allegedly gave § 87(2)(b) the middle finger, and said, "Fuck you, you can get the fuck out of here now," (**Allegation E – Discourtesy:** § 87(2)(g)). The officers got back in their cars and left.

Immediately after the officers left, § 87(2)(b) went to the 40<sup>th</sup> Precinct stationhouse to file a complaint against the officers who had stopped him. He spoke to an unidentified officer and told him that he wanted to file a complaint against PO Bautista and PO McCloud. The officer told him to call the CCRB to file his complaint (**Allegation F – Abuse of Authority:** § 87(2)(g)). After that, § 87(2)(b) left the area.

### Findings and Recommendations

**Allegation (A) Abuse of Authority: At § 87(2)(b) in the Bronx, PO Malik McCloud stopped § 87(2)(b)**

**Allegation (B) Abuse of Authority: At § 87(2)(b) in the Bronx, PO Ernesto Bautista stopped § 87(2)(b)**

§ 87(2)(b) (Board Review 02) stated that he was approached by PO Bautista and PO McCloud after leaving his doctor's office, who told him that he was being detained and asked him about a dispute that had allegedly occurred inside the doctor's office. § 87(2)(b) denied that he had been in any kind of a dispute in the doctor's office prior to the stop. Despite being told he was stopped, § 87(2)(b) said that he was leaving and the officers let him go.

PO Bautista (Board Review 03) and PO McCloud (Board Review 04) § 87(2)(g) stated that they had gone to the location responding to a call of a dispute involving a firearm. When they arrived, they spoke to an employee of the doctor's office who stated that § 87(2)(b) had gotten into an argument with them and said he would come back and "shoot up" the location. The employee then pointed out § 87(2)(b) who by then was outside on the street getting into his vehicle. Both officers denied stopping § 87(2)(b).

§ 87(2)(b) but acknowledged that they approached him, asked him about the incident, and informed him that the employees of the office did not want him coming back. § 87(2)(b) was never detained, and left of his own volition after a brief discussion.

PO Sancho (Board Review 05) corroborated the account of the officers' interaction with the employee of the doctor's office, but she was not present when officers approached § 87(2)(b).

§ 87(2)(b) PO Lopez (Board Review 06) could not recall the incident.

In People v. DeBour, the Court established levels of police interaction ranging from a common law inquiry, which requires that officers only have an objective credible reason for doing so, to a stop, which requires that officers have a reasonable suspicion that criminal activity is afoot. The defining feature in determining whether a stop has occurred is whether a reasonable person would consider themselves free to leave the interaction. (People v. De Bour, 40 N.Y.2d 210 [1976]) (Board Review 14).

§ 87(2)(g)

**Allegation (C) Discourtesy: At East 143rd Street and Third Avenue, in the Bronx, PO**

**Ernesto Bautista spoke discourteously to § 87(2)(b)**

**Allegation (D) Abuse of Authority: At East 143rd Street and Third Avenue, in the Bronx,**

**PO Ernesto Bautista threatened § 87(2)(b) with the use of force.**

**Allegation (E) Discourtesy: At East 143rd Street and Third Avenue, in the Bronx, PO**

**Ernesto Bautista gestured discourteously to § 87(2)(b)**

§ 87(2)(b) alleged that, from the time PO Bautista approached his car up until he walked back to the police vehicle to write the summonses, he said, "Open your fucking window," and "I'll kick your ass," multiple times. Then, after issuing § 87(2)(b) the summonses and walking away, he gave § 87(2)(b) the middle finger and said, "Fuck you, you can get the fuck out of here now."

Body Worn Camera footage was received from PO Ernesto Bautista (Board Review 01). The footage is 18:48 minutes long. Filmed entirely from the point of view of PO Bautista. At the start of the video, PO Bautista is standing outside the driver's side of § 87(2)(b)'s vehicle, asking him to roll down his windows. He tells him to lower his windows halfway, but never says, "Lower your fucking windows."

At 00:28 seconds into the recording, PO Bautista leans in towards § 87(2)(b) in the driver's seat, appearing to be reading the tint levels on his windows. He says, under his breath, "Fucking ass pussy playing games." After that, PO Bautista walks around to the other side of the car, and makes the same command for § 87(2)(b) to open his windows, which he does. PO Bautista appears to read the window tints, and then he returns to his car. § 87(2)(b) is shouting at PO Bautista as this happens, and arguing with some of the other officer's present, but PO Bautista does not direct any additional profanity at § 87(2)(b) or threaten him with the use of force. He never says, "I'll whip your ass," or something similar. At 18:32 in the video, PO Bautista exits his vehicle and approaches § 87(2)(b). He appears to hand § 87(2)(b) the tickets, says, "Bye," and then turns off his camera.

In his CCRB interview PO Bautista denied ever saying “I’ll whip your ass,” to § 87(2)(b) or giving him the middle finger. He could not recall if he ever said, “Open your fucking window,” or “Fuck you, you can get the fuck out of here,” or whether he otherwise directed profanity at § 87(2)(b). However, after viewing his body worn camera footage during his CCRB interview, he admitted saying, “Fucking ass pussy playing games,” to § 87(2)(b) although he could not independently recall saying that during the incident.

PO McCloud denied ever witnessing PO Bautista threaten § 87(2)(b) use any discourtesy, or give him the middle finger during the incident. PO McCloud also viewed PO Bautista’s body worn camera footage during the incident, and acknowledged both that he heard PO Bautista say in the footage, “Fucking ass pussy playing games,” and that he had been standing next to PO Bautista when it was said, but stated that he did not have an independent recollection of it happening during the incident.

PO Sancho could not recall any conversation between § 87(2)(b) and officers during the incident. She denied ever witnessing any profanity or threats of force. PO Lopez could not recall the incident.

The body worn camera footage from PO Bautista covers the time from his first approach to § 87(2)(b) in his driver’s seat until immediately after he hands PO Bautista his tickets. Therefore, it covers the time of the alleged statements “Open your fucking window,” and “I’ll whip your ass,” but not the alleged, “Get the fuck out of here” or the alleged showing of the middle finger. The footage shows that PO Bautista did not threaten § 87(2)(b) or say, “Open your fucking window.” The footage does show PO Bautista saying, “fucking ass pussy playing games.”

Under the provisions of Patrol Guide Procedure 203-09, officers are required to be courteous and respectful towards the public (Board Review 13).

§ 87(2)(g)

[REDACTED]

**Allegation (F) – Abuse of Authority: At the 40th Precinct stationhouse, in the Bronx, an officer did not process § 87(2)(b)’s complaint regarding an officer.**

§ 87(2)(b) stated that he went to the 40<sup>th</sup> Precinct stationhouse after the incident, and spoke to a uniformed dark-skinned Hispanic male officer of average height and build, with the name “Ramos” on his badge. § 87(2)(b) told him that he wanted to file a complaint, and that officer directed him to the CCRB’s hotline and told him to call. § 87(2)(b) encountered this officer in the lobby of the stationhouse, but he was not stationed behind the front desk. The investigation was unable to identify this officer for several reasons. First off all, according to the 40<sup>th</sup> Precinct roll call related to the incident, there was no officer with the surname “Ramos” working in the 40<sup>th</sup> Precinct at the time of the incident. Secondly, there were more than 30

officers who matched the description provided by § 87(2)(b) at the time of the incident (Board Review 07). Thirdly, the incident was not documented in the command log (Board Review 15),

§ 87(2)(g)

§ 87(2)(g)

### **Civilian and Officer CCRB Histories**

- This is the first CCRB complaint involving § 87(2)(b) (Board Review 08).
- PO Bautista has been the subject of 21 other allegations of misconduct across 7 other cases during his 6 year tenure with the NYPD, five of which were substantiated (Board Review 09):
  - In Case 201506161, PO Bautista was found to have used excessive force and also a chokehold on an individual. The CCRB recommended charges, he PO Bautista was found not guilty at an APU trial.
  - In Case 201701649, PO Bautista was found to have stopped, frisked, and searched an individual without justification. Instructions were recommended by the CCRB, and formalized retraining was carried out by the NYPD.
- PO McCloud has been the subject of 13 other allegations of misconduct in 6 other cases during his six year tenure with the NYPD, two of which were substantiated (Board Review 10):
  - In case 201701649, PO McCloud was found to have frisked and searched an individual without justification. Instructions were recommended by the CCRB, and formalized retraining was carried out by the NYPD.

### **Mediation, Civil and Criminal Histories**

- § 87(2)(b) rejected mediation in this case.
- There has been no Notice of Claim filed related to this incident with the New York City Comptroller's Office as of February 6, 2019 (Board Review 11).
- According to the Office of Court Administration, § 87(2)(b) has no history of criminal convictions in New York City within the last ten years (Board Review 12).

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Squad No.: \_\_\_\_\_

Investigator: \_\_\_\_\_

Signature	Print Title & Name	Date
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Squad Leader: \_\_\_\_\_

Signature	Print Title & Name	Date
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Reviewer: \_\_\_\_\_

Signature

Print Title & Name

Date

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